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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

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RIN 1615-ZB15

CNMI-Only Transitional Worker Numerical Limitation for Fiscal Year 2013

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notification of numerical limitation.

SUMMARY: The Secretary of Homeland Security announces that the numerical limitation for the annual fiscal year numerical limitation for CNMI-only Transitional Worker (CW-1) nonimmigrant classification for fiscal year 2013 is set at 15,000. In accordance with Title VII of the Consolidated Natural Resources Act of 2008 (CNRA) (codified, in relevant part, at 48 U.S.C. 1806(d)) and 8 CFR 214.2(w)(1)(viii)(C), this document announces the mandated annual reduction of the CW-1 numerical limit and provides the public with information regarding the new CW-1 numerical limit. This document is intended to ensure that CNMI employers and employees have sufficient notice regarding the maximum number of workers who may be granted transitional worker status during the upcoming fiscal year.

EFFECTIVE DATE: [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Steven W. Viger, Adjudications Officer (Policy), Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2060. Contact telephone (202) 272-1470.

SUPPLEMENTARY INFORMATION:

I. Background

Title VII of the Consolidated Natural Resources Act of 2008 (CNRA) extends U.S. immigration law to the CNMI and provides CNMI-specific provisions affecting foreign workers. See Pub. L. 110-229, 122 Stat. 754, 853 (2008). The CNRA included provisions for a “transition period” to phase-out the CNMI’s nonresident contract worker program and phase-in the U.S. federal immigration system in a manner that minimizes the adverse economic and fiscal effects and maximizes the CNMI’s potential for future economic and business growth. See sec. 701(b) of the CNRA, 48 U.S.C. 1806 note. The CNRA authorized DHS to create a nonimmigrant classification that would ensure adequate employment in the CNMI during the transition period, which ends December 31, 2014.¹ See id.; 48 U.S.C. 1806(d)(2). The CNRA also mandated an annual reduction in the allocation of the number of permits issued per year and the total elimination of the CW nonimmigrant classification by the end of the transition period. 48 U.S.C. 1806(d)(2).

Consistent with this mandate under the CNRA, DHS published a final rule on September 7, 2011 amending the regulations at 8 CFR 214.2(w) to implement a temporary, CNMI-only transitional worker nonimmigrant classification (CW classification, which includes CW-1 for principal workers and CW-2 for spouses and minor children). See 76 FR 55502 (Sept. 7, 2011). DHS established the CW-1 numerical limitation for fiscal year 2011 at 22,417 and for fiscal year 2012 at 22,416. See 8 CFR 214.2(w)(1)(viii)(A) and (B). In the final rule, DHS did not provide a numerical limit

¹ The Secretary of Labor is authorized to extend the transitional worker program beyond December 31, 2014 for additional periods of up to five years each. See 48 U.S.C. 1806(d)(5).

reduction plan for the remainder of the transition period. DHS instead delayed development of a numerical limit reduction plan due to the uncertainty of the CNMI's future workforce needs and economic conditions. See 76 FR at 55510. As such, DHS opted to publish any future annual numerical limitation in a Federal Register notice. See 8 CFR 214.2(w)(1)(viii)(C). This method maximizes the CNMI's potential for future economic growth by providing flexibility for the continued use of workers during this phase-in of Federal immigration law. See 76 FR at 55510.

The numerical limitations set forth in the final rule for the first two years of the CW classification provided a baseline for the maximum number of transitional workers in the CNMI.² This initial approach to the allocation system ensured that employers had an adequate supply of workers for the projected CW nonimmigrant visas needed to transition umbrella permit holders to CW-1 status. This approach also provided DHS with the flexibility to adjust to the future needs of the CNMI economy and to assess the total alien workforce needs based on the number of requests for transitional worker nonimmigrant classification received following implementation of the final rule. Based on these factors, DHS determined that it would assess the CNMI's workforce needs on a yearly basis. See 8 CFR 214.2(w)(1)(viii)(C).

II. Maximum CW-1 Workers for Fiscal Year 2013.

The maximum number of CW-1 workers announced in this document (15,000) is

² The 22,417 number was the total number of foreign workers working in the Commonwealth, according to the CNMI government estimate of the nonresident workers present as of May 8, 2008, the date of enactment of the CNRA. DHS established this limit based on the CNMI government estimate. See Letter from Benigno Fitial, Governor of the Commonwealth of the Northern Mariana Islands to Richard C. Barth, Assistant Secretary for Policy Development, and Stewart A. Baker, Assistant Secretary for Policy, Office of Policy, Department of Homeland Security (July 18, 2008) (available at www.regulations.gov under DHS Docket No. USCIS-2008-0038).

appropriate based on the actual demonstrated need for foreign workers within the CNMI. In the final rule, DHS provided for an accurate assessment of the actual labor needs within the CNMI by setting a limit in the final rule that ensured an adequate supply of CW visas to test the labor market. Although DHS set the numerical limitation for fiscal year 2012 at 22,416, employers in the CNMI have filed only 5,985 Petitions for CNMI-Only Nonimmigrant Transitional Workers (Form I-129 CW), requesting a total of 12,247 transitional workers.³ Therefore, DHS believes the numerical limitation provided for fiscal year 2012 greatly outweighed the demand for labor and the number of requests received for CW classification in fiscal year 2012 to date provides a more appropriate baseline for the maximum number of transitional workers in the CNMI.

All requests received to date were submitted during fiscal year 2012, as the final rule took effect shortly after the beginning of that fiscal year. USCIS has not completed adjudication of these requests but anticipates doing so before the end of the current calendar year. These requests, to the extent they are granted, will be counted under the fiscal year 2012 cap of 22,416. The vast majority of CW petitions were filed by CNMI employers in November 2011, shortly before the expiration of “grandfathered” CNMI work authorization on November 27, 2011. See 48 U.S.C. 1806(e)(2). For these reasons, DHS believes that the number of requested CW-1 workers to date in fiscal year 2012 is an accurate baseline to use in determining the likely demand in fiscal year 2013.

The CNRA requires an annual reduction in the number of transitional workers (and complete elimination of the CW nonimmigrant classification by the end of the

³ USCIS Office of Performance and Quality (OPQ), Data Analysis and Reporting Branch (DARB), figures provided as of September 4, 2012. Of the petitions adjudicated to date, 239 petitions for a total of 320 beneficiaries have been denied.

transition period) but does not mandate a specific reduction. See 48 U.S.C. 1806(d)(2). In addition, 8 CFR 214.2(w)(1)(viii)(C) provides that the numerical limitation for any fiscal year will be less than the number for the previous fiscal year, and it will be reasonably calculated to reduce the number of CW-1 nonimmigrant workers to zero by the end of the transition period.

To comply with these requirements, meet the CNMI's labor market's needs, and provide opportunity for growth, DHS has set the numerical limitation for fiscal year 2013 at 15,000. DHS calculated this figure by first taking the number of CW-1 nonimmigrant workers needed based on fiscal year 2012 filings to date of 12,247 (or 11,927, taking into account 320 denials to date), which rounded to the nearest thousand is 12,000. DHS then added an additional 25 percent to the 12,000 to accommodate possible economic growth that might lead to a need for additional CW workers, for a total of 15,000. Accordingly, DHS reduces the number of transitional workers from the current fiscal year numerical limitation of 22,416, and establishes the maximum number of CW-1 visas available for fiscal year 2013 at 15,000.

This number of CW-1 workers will be available beginning on October 1, 2012. DHS may adjust the numerical limitation for a fiscal year or other period, in its discretion, at any time via notice in the Federal Register. See 8 CFR 214.2(w)(1)(viii)(D). Consistent with the rules applicable to other nonimmigrant worker visa classifications, if the numerical limitation for the fiscal year is not reached, the unused numbers do not carry over to the next fiscal year. See 8 CFR 214.2(w)(1)(viii)(E).

Petitions requesting a validity start date within fiscal year 2013 will be counted

against the 15,000 limit. As such, each CW-1 worker who is listed on a Form I-129CW is counted against the numerical limitation at the time USCIS receives the petition. Counting the petitions in this manner will help ensure that USCIS does not approve requests for more than 15,000 CW-1 workers. If the number of CW-1 workers approaches the 15,000 limit, USCIS will hold any subsequently-filed petition until a final determination is made on the petitions that are already included in the numerical count. Subsequently-filed petitions will be forwarded for adjudication in the order in which they were received until USCIS has approved petitions for the maximum number of CW workers; any remaining petitions that were held or that are newly received will be rejected.

This document does not affect the status of aliens who hold CW-1 nonimmigrant status. Aliens currently holding such status, however, will be affected by this document when they apply for an extension of their CW-1 classification, or a change of status from another nonimmigrant status to CW-1 status.

This document does not affect the status of any alien currently holding CW-2 status as the spouse or minor child of a CW-1 nonimmigrant. This document also does not directly affect the ability of any alien to extend or otherwise obtain CW-2 status, as the numerical limitation applies to CW-1 principals only. Aliens seeking CW-2 status may be affected indirectly by the applicability of the cap to the CW-1 principals from whom their status is derived.

Janet Napolitano,
Secretary.

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